United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-1554

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United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

MICHAEL PATERNO, GEORGE DENTI and
PATERNO & SONS, INC.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLANTS MICHAEL PATERNO AND PATERNO & SONS, INC.

ARTHUR KARGER,
Attorney for Defendants-Appellants,
Michael Paterno and
Paterno & Sons, Inc.,
600 Madison Avenue,
New York, N. Y. 10022.

ARTHUR KARGER,
JAMES O. DRUKER,
Of Counsel

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Preliminary Statement

Defendants Michael Paterno and Paterno & Sons, Inc. have appealed from judgments of the United States District Court for the Southern District of New York, entered on February 22, 1974, which convicted them, following a trial before the Hon. Marvin E. Frankel and a jury, of the following crimes:

(a) Count 1—against both of said defendants—charging conspiracy to violate 26 U.S.C. § 7201 by evading and attempting to evade the payment of Federal income taxes due from the corporate defendant for each of the latter's five fiscal years ending on the last day of February of 1966, 1967, 1968, 1969 and 1970, respectively;

(b) Counts 2, 3, 4 and 5—against both of said defendants—charging them with substantive violations of 26 U.S.C. § 7201 with reference to each of the corporate defendant's four fiscal years ending on the last day of February of 1967, 1968, 1969 and 1970, respectively; and

(c) Counts 6, 7 and 8—against defendant Michael Paterno alone—charging him with substantive violations of 26 U.S.C. § 7206(1) by subscribing false income tax returns of the corporate defendant for the three fiscal years ending on the last day of February of 1967, 1968 and 1969, respectively.

A third defendant, George Denti, was also convicted of the crimes charged in Counts 1 through 5, as well as a separate Count 9, charging him with having violated 26 U.S.C. § 7206(1) by subscribing a false income tax return of the corporate defendant for its fiscal year ending February 28, 1970. Defendant Denti has also taken an appeal to this Court.

Defendant Michael Paterno was sentenced to a term of imprisonment of 9 months on each of Counts 1 through 8, to run concurrently, and was also fined $2,500.00 on each of the 8 counts, aggregating $20,000.00 (1976a-1978a).* Paterno & Sons, Inc. was fined $5,000.00 on each of Counts 1 through 5, aggregating $25,000.00 (1979a-1980a).

Issues Presented

1. Whether the defendants Michael Paterno and Paterno & Sons, Inc. were entitled to judgments of acquittal in this prosecution for conspiracy to violate 26 U.S.C. § 7201 and for substantive violations of 26 U.S.C. §§ 7201 and 7206(1), because of the legal insufficiency of the evidence to establish the requisite elements of wilfulness, guilty knowledge and criminal intent on their part.

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* Unless otherwise specified, figures in parentheses followed by the letter "a" refer to the pages of Appellants' Joint Appendix, "G.Exh." refers to a Government Exhibit, and "D.Exh." refers to a Defendants' Exhibit.

2. Whether the defendants were denied a fair trial as required by due process, by reason of the prejudicial action of the trial court in demeaning their defense in the presence of the jury and in erroneously hampering their presentation of their defense.

3. Defendants Michael Paterno and Paterno & Sons, Inc. hereby adopt by reference such points urged in the brief of defendant George Denti as are applicable to them.

Statement of the Case

The evidence showed that defendant Paterno & Sons, Inc. was a New York corporation engaged in the business of constructing and installing sewers as well as handling sewage treatment plant work (1210a). Its services on such projects included the necessary work of excavating and arranging for the removal and carting away by trucks of the earth that was excavated (1211a). For that purpose, the company hired truckers, who would supply the trucks as well as the drivers to haul the excavated earth away to a dump site (1211a-1212a).

Defendant Michael Paterno was the president and principal of the corporate defendant (1210a). Defendant George Denti was the corporate defendant's "office manager and he was in charge of equipment and the shop and maintenance of equipment" and had the title of secretary-treasurer (1210a).

The indictment contained 9 counts and, as noted above, charged a conspiracy to violate 26 U.S.C. § 7201, as well as substantive violations of 26 U.S.C. §§ 7201 and 7206 in relation to the corporate income tax returns of Paterno & Sons, Inc. over a period of five fiscal years for the conspiracy charge and four fiscal years for the substantive charges.

The pertinent statutes are set forth in an addendum, *infra*, p. 40. 26 U.S.C. § 7201 declares guilty of a crime any person who "willfully attempts in any manner to evade

or defeat any tax imposed by this title [26] or the payment thereof." 26 U.S.C. § 7206(1) declares guilty of a crime any person who "willfully makes and subscribes any return, statement, or any document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he doesn't believe to be true and correct as to every material matter."

The indictment, in brief, charged that the defendants had violated the above statutes by fraudulently deducting as business expenses in the corporation's income tax returns for the fiscal periods mentioned above, certain purported expenses for equipment rentals which the defendants "well knew" had not been incurred (11a). The expenses in question, according to the Government, were the amounts represented by a total of 48 checks which had been issued by the corporation during the period between June 1965 and July 1969 to the order of fictitious payees. There were five payees involved—John Aurrichio, Michael Catenzaro, Anthony Ferrotta, Arthur Lazravitch and Thomas Tuccella, all five purporting to be truckers who had furnished trucks and trucking services to the corporate defendant in connection with the removal and carting away of earth excavated from various of the corporation's job sites.

The corporate income tax returns of the corporate defendant here in question were, as noted, those for the fiscal years ending on the last day of February of 1966, 1967, 1968, 1969 and 1970, respectively (111a-112a; G.Exhs. 50-54). The first four returns were signed by defendant Paterno as president of the corporation (G.Exhs. 50-53). The last return was signed by defendant Denti as secretary-treasurer (G.Exh. 54).

An "in-depth audit" of those returns was conducted for the Internal Revenue Service (hereinafter "IRS") by Revenue Agent Anthony J. Rizzo, commencing in December 1970 and continuing until April 1971 (198a). Rizzo admitted that in the course of his audit he was furnished with any and all information and records requested by him and was in fact given free access to the corporate safe containing the company's records, and that no one

connected with the corporation in any way attempted to improperly influence him (244a-245a).

Rizzo found the corporation's income to have been properly reported in the corporate returns (220a). However, in checking the deductions taken for equipment rental expenses, he came across the checks mentioned above which had been issued to the order of the five payees, Aurrichio, Catenzaro, Ferrotta, Lazravitch and Tuccella. Those checks had cashier's stamps on their face indicating that they had been cashed by the payees (202a-204a). There were other checks payable to other payees which bore similar stamps on their face, but the amounts of those checks were much smaller than the amounts of the checks payable to the five payees in question (205a).

There were a total of 48 checks here involved payable to the five payees in question (G.Exhs. 1-48), and there were also invoices for the expenses represented by such checks which had been typed on printed letterheads which bore the names, addresses and telephone numbers of the respective payees (G.Exhs. 1a-12a, 14a-28a, 30a-34a, 36a-47a).

Rizzo testified that he and his supervisor investigated the addresses which were listed on the said invoices, and that they could not find any of the persons in question at any of such addresses, and that two of the addresses were in fact non-existent (210a-215a). The Government also adduced the testimony of a number of postal carriers to confirm Rizzo's testimony as to the non-existence of the addresses that appeared on two of the payees' invoices in question, and as to the fact that the other three payees could not be found at the addresses listed on their invoices (364a-392a).

The Government further adduced proof, through the testimony of witnesses from various labor unions and various federal and state agencies, that the five payees in question (a) were not registered with any of the union locals dealing with truckers (521a-522a, 796a-798a, 997a); (b) were not shown to have any policies of workmen's

compensation insurance (609a-612a); (c) had not filed any state income tax returns with the New York State Department of Taxation and Finance (784a-789a); (d) did not subscribe to the telephone numbers listed on the invoices in question (607a-608a); (e) did not have any New York State driver's or chauffer's licenses during the years 1969 to 1972 (824a-825a); and (f) had not filed any federal income tax returns during the years 1965 to 1970 (119a-124a).

Most of the checks in question had been cashed at the branch of the Royal National Bank (subsequently "Security National Bank") at 326 East 149th Street, Bronx, New York, where the corporate defendant had an account, and the Government called as witnesses two former officers and an employee of that bank—Conrad Hoffmann, Gaeton J. Andretta and Thomas Colantino.

Hoffmann, a former vice-president of the Royal National Bank, who had been in charge of the aforementioned Bronx branch during the years 1965 to 1970, testified that Paterno & Sons, Inc. maintained a sizeable commercial banking account at that bank and that he knew defendants Paterno and Denti as customers of the bank (343a, 349a). Among Hoffmann's responsibilities was the approval of checks (342a), and he testified that there were certain set procedures in relation thereto during the years 1965 to 1970 (343a-344a). Specifically, when a check of $100 or more was presented for cashing, the bank would first contact the customer on whose account the check was drawn, and if the check was approved, Hoffmann would place his initials on the face of the check (344a). On occasion, he would initial the back of the check to indicate approval of the endorsement (344a).

Upon being shown some 27 of the 48 checks issued to the five payees in question, Hoffman recognized his initials on 26 of such checks (345a-347a). Hoffmann testified that although he approved the cashing of those checks, he did not personally know any of the payees (348a-349a). He recalled that the persons cashing the checks were dressed in working clothes (349a) and that he had approved the

cashing of such checks in each instance after a telephone call from defendant George Denti who "would call me up and tell me that [a] check was being sent over to the bank payable to so-and-so and for X number of dollars and to cash it" (350a). Hoffmann added that the bank's practice of requiring identification from anyone who sought to cash a check in excess of $100 was not followed in these instances because of Denti's oral authorization (352a-353a).

Hoffmann further testified about a conversation which he had with defendant Denti shortly before Hoffmann was subpoenaed before the Grand Jury investigating the case. According to Hoffmann, he told Denti that the IRS was questioning the validity of the checks to the payees here involved and that Denti's response was that "these were legitimate checks" for "trucking bills" and that "there was no problem" (357a-358a). However, Hoffmann stated that he had never spoken with defendant Paterno with respect to these checks (356a, 359a-360a).

Andretta, who had been an operations officer at the 149th Street branch of the Royal National Bank during the period in question (394a), testified that he had known defendants Paterno and Denti for many years (394a-395a). He further testified that on four occasions he had cashed checks made out by Paterno & Sons, Inc. to John Aurrichio (400a). On three of these occasions, he cashed the checks only after a telephone call from Denti requesting that the check be cashed (400a-401a). On another occasion, Andretta himself telephoned Denti and asked whether it was "okay to cash the check" (402a).

Andretta also testified concerning a meeting which he had with both Paterno and Denti on the occasion of Andretta's having received a subpoena to testify before the Grand Jury (404a). Andretta started to testify as to what "they" had said to him, and he was then instructed to state what each of the individual defendants separately said to him (405a). Andretta thereupon stated: "I don't remember what each particular one said, you know, word for word" (405a). The Court thereupon instructed him to state "the

substance" and Andretta testified that "the substance was that these checks represented checks payable to truckers who had performed work for them" (405a-406a). However, he was unable to specify which of the individual defendants made that statement to him.

Andretta also testified to a subsequent conversation which he had with Denti alone, and when he was asked what Denti had stated "with relation to the existence or non-existence of these truckers", Andretta's answer was: "The same thing, that they existed, that those checks were payable to truckers that performed work for Paterno & Sons" (409a).

Colantino, who had been assistant cashier at the 149th Street branch of the Royal National Bank during the period here involved, testified that he had approved several of the checks in question for cashing (556a). He stated that he would either have called the office of Paterno & Sons, Inc. for such approval or that that office would have called him (557a). However, when he was asked to specify the person or persons to whom he spoke at the office of Paterno & Sons, Inc., his answer was: "I cannot say specifically who I spoke to" (557a-561a).

William S. Oberg, a handwriting expert, testified that it was his conclusion, on the basis of comparison of the endorsements on the checks to the payees in question with exemplars of defendant Denti's handwriting, that the endorsements on five of such checks—two payable to Aurrichio, two to Lazravitch and one to Tuccella—were in the same handwriting as that of Denti (840a, 842a-848a). However, though Oberg had also been furnished with exemplars of defendant Paterno's handwriting, he was unable to "identify Michael Paterno as the writer of any [of the questioned] endorsements" (989a-990a). Oberg further testified that his examination of a number of the invoices in question led him to conclude that the same typewriter was used to prepare six of such invoices—G.Exh.'s 1a-4a, 14a, 15a (851a-852a). There was no evidence however, as to the particular typewriter which had been

used for that purpose or as to whether such invoices had been prepared on a typewriter in the office of Paterno & Sons, Inc. (860a).

The practice of the corporate defendant with respect to the hiring of trucks was described by one of its construction superintendents, James J. O'Reilly (1205a), as well as by Salvatore Minichino, president of Taff Trucking Corp., which rented trucks and drivers to the corporate defendant and other contractors for "haul excavation work" (616a-619a). The company would hire truckers to haul away excavated earth and other material, and such truckers would also supply the drivers (1212a). There were a great many different truckers available for such work and many of the trucks had no truckers' names on them (639a). When O'Reilly was asked if he had maintained a list of truckers with whom Paterno & Sons, Inc. did business during the period from 1965 to 1970, O'Reilly's answer was: "I didn't have a list of truckers. You know there's a thousand truckers" (1232a).

When the company prepared for a particular job, the word would spread and numerous truckers would stop by to inquire as to when the actual excavation was to commence; they would be informed of the date, and they would then pass the word along to other truckers and friends (1285a-1286a). Minichino testified that when he was requested to supply more trucks than his company actually owned for particular hauling work, he would call on other truckers and he would "call one trucker, and that trucker would call another trucker, and so on, and it keeps going down the line that way" (624a, 643a). Generally, Minichino would do the billing for such other truckers as well as for his company's own trucks; however, some of such truckers insisted on billing Paterno & Sons, Inc. directly (644a).

O'Reilly further testified that the superintendent on the job site would submit a daily report to the company's office as to the number of trucks that were on the job on a given day (1215a). The practice was for the particular truck driver at the end of each day to give a ticket to O'Reilly, or to the company's foreman or to a signalman, and the

original ticket would be signed and returned to the trucker to confirm that the truck was at the job site for the day, but O'Reilly would keep a copy which would be attached to his daily report (1215a-1216a). Occasionally, however, O'Reilly would not obtain such tickets, since "sometimes the laborers keep them in their pockets and you just don't get them" (1215a-1216a).

The Government also adduced testimony from three young women who had worked in the office of the corporate defendant—Mrs. Louise Ferraro, who worked for the company as a bookkeeper from 1964 to sometime in early 1968 (1076a); Mrs. Anne Altro, who was Mrs. Ferraro's sister and worked for the company as a bookkeeper from May 1968 through 1970 (670a); and Miss Mae Nunkin, who worked for the company from the spring of 1968 until the summer of 1970 and whose work was mainly that of typing although she did on occasion also prepare checks (1017a-1018a).

Mrs. Ferraro testified that invoices would be stamped with a date stamp showing the date of their receipt, and would then be entered into a purchase book and filed in an accordion file in alphabetical order to await payment (1087a-1089a). She further testified: "Well, *if I had receipts for these invoices* they would be attached" (1098a; emphasis supplied). However, she didn't specify as to how she would attach such receipts, whether by paper clip or by staple (1097a-1098a).

She "would usually get them [the receipts] off the cost sheets", which would be found in the "cost folder" for the particular job (1098a). She further testified that there were occasions when there were no receipts with the cost sheet relating to a particular invoice, and that on such occasions she would "usually refer right to the cost sheet because all the equipment on the job had to be listed on the cost sheet" (1098a-1099a). She also stated that "it would be highly unlikely" for there to be a situation where there were no receipts "and there was nothing on the cost sheet to indicate that that invoice applied to that particular cost sheet" (1099a).

Mrs. Ferraro further testified that at the end of each month she would prepare an accounts payable list which she would present to Paterno who would decide whom and how much to pay (1090a-1092a). The accounts payable list included virtually every expense incurred by the corporation, including "materials, suppliers, rentals, utilities, just about everything" (1092a), and there would be "hundreds of bills" (1097a). She would then prepare the appropriate checks for signature by Paterno or by the company's vice-president, Thomas Cohill, who was also authorized to sign checks (1115a-1116a).

Mrs. Ferraro testified that whenever she presented a check to Paterno for signature, she always presented back-up or substantiation material with it and that she followed the same practice when she presented checks for Cohill's signature (1115a-1116a). She also testified that Paterno would never sign a check "without having substantiation to show that that payment was due and owing" (1123a).

Miss Nunkin similarly testified that no check was ever presented to Paterno for signature, where she was present, without back-up or substantiation material (1033a).

Mrs. Altro likewise testified that Paterno never signed a check to her knowledge without back-up material of some kind (755a-757a), and that the same practice was followed by Cohill (759a).

Mrs. Altro further testified that she never presented a check to Paterno for signature where there were no delivery tickets attached to the invoices, and that her practice was to staple the delivery tickets to the invoices (678a, 692a). However, she also affirmed the truth of a statement she had given to the IRS, that there were occasions when "George Denti would instruct her to prepare checks without delivery receipts" and would tell her "that he, George Denti, would explain the lack of substantiation to Mike Paterno" (685a-692a). She further testified that, apparently on such occasions, Denti would take the checks, which she had prepared, to Paterno for the latter's signature (692a).

Mrs. Altro also testified that when she found that there were no delivery receipts in the office for a particular invoice, it was her practice to attempt to obtain the missing receipts from the trucker involved, but that it would not be necessary for her to do so if the particular truck rental was listed on the cost sheet (763a-764a). She further testified that when there were no receipts available, she would also call the superintendent on the job to get the pertinent back-up information and would so advise Paterno if the superintendent "okayed" the particular truck rental charge (756a).

Mrs. Altro identified several of the invoices in question (G.Exhs. 36, 37, 38 and 39) as bearing defendant Denti's initials underneath the notation "O.K.", signifying that Denti had approved those particular invoices (705a-706a).

Mrs. Altro also testified that "Mike [Paterno] and George [Denti]" "selected and confirmed the order of payment in which all the bills would be paid (693a), but she subsequently stated that she actually had no personal knowledge of this (701a) and in fact had no idea of who selected the order of payment (702a). She further stated that she did not know the basis on which the particular payees or expenses were selected for payment (693a-694a).

There was testimony by Mrs. Ferraro that in the interests of conserving space, her practice was to remove the back-up receipts from the files and dispose of them after some time had elapsed subsequent to the payment of the particular invoices, leaving only the invoices and the cancelled checks in the files (1106a, 1120a). The company moved its offices several times (1052a, 1078a, 1126a), and Mrs. Altro testified that while the company was at its former City Island office, the cost sheets had been removed from the filing cabinets because of shortage of space and put in cardboard boxes (710a-711a). She apparently did not know what had become of those boxes (711a).

In addition, there was testimony that checks would not always be mailed to the truckers involved, and that many times truckers would phone the office to say that they were

coming in to pick up their checks or to request that the checks be sent out to the job site, and such requests were complied with (758a, 1111a).

The Government further adduced testimony from O'Reilly and Mrs. Ferraro concerning certain statements made to them by Paterno relating to the subject matter of this case.

O'Reilly testified that what Paterno said to him was that "There are some trucks we said we had and they are saying we didn't have", or phrased somewhat differently, "They are questioning some trucks we claim we did have and they say we didn't have" (1260a-1262a). O'Reilly further testified that Paterno also said to him: "Whatever questions they ask you, just answer truthfully and to the best of your memory" (1261a). O'Reilly also testified that he had a similar conversation with defendant Denti (1263a-1264a).

Mrs. Ferraro testified that when she received a subpoena to testify before the Grand Jury, she spoke with Paterno and Denti and asked them "what it was all about" (1112a). She was uncertain as to whether it was Paterno or Denti who answered her question, but she was then asked specifically what Paterno said and her answer was: "I asked him what it was all about and he said that they claimed that these truckers do not exist" and that "He said they did" (1112a). She further testified that Denti made a similar statement to her (1113a).

The Government also read into the record excerpts from testimony given by Denti before the IRS in July and August 1971 (1141a-1148a; G.Exh. 162-C). In that testimony, Denti, upon being asked how Aurrichio, one of the five payees in question, had been hired to work for Paterno & Sons, Inc., answered: "Through Taff [Trucking]" (1145a). He stated that he himself did not know Auricchio and that the latter had probably been contacted by Taff (1146a). He then affirmed "that Auricchio *may* have been hired through Taff Trucking" (1146a), and when asked whether Catenzaro, another of the five payees,

had been hired through Taff Trucking, he answered "Probably" (1147a). When he was asked whether he knew Catenzaro, Lazravitch or Tuccella, he answered that he did not (1147a-1148a).

On the other hand, Minichino, the principal of Taff Trucking, testified that he was not familiar with, and had never heard of, any truckers by the names of the five payees in question, and that he never arranged for any trucker by any of such names to work for Paterno & Sons, Inc. (628a-630a). But Minichino admitted that he could not recall the names of all the truckers he had hired (624a, 634a).

The Government also adduced evidence designed to show that some of the invoices in question included charges for trucking work claimed to have been performed on particular days when there was no work being done on the job site involved. Thus, Hans Clausen, a consulting civil engineer, testified that he had rendered certain supervisory work on a certain sewage treatment plant job which Paterno & Sons, Inc. was handling in Cedarhurst in 1967 and 1968 (1148a-1150a). Clausen kept certain journals, though not required to do so, in which he recorded his observations regarding the particular project (1151a-1153a). Among the entries in those journals in Clausen's handwriting were statements that on December 11, 1967, it was raining both at 8:00 a.m., 2:00 p.m. and 4:00 p.m. and that "All contractors sent their men home"; and that on December 12, 1967, "No contractor has men working" and "Paterno started at 8:00 a.m., stops at 8:30 a.m." (1161a-1163a).

In addition, Walter Nebesny, an assistant civil engineer employed by the City of New York, testified that his responsibilities included the supervision and inspection of construction, and that he was assigned in the fall of 1967 to a certain sewer job being handled by Paterno & Sons, Inc. on Johnson Avenue, Brooklyn, N.Y. (1361a-1363a). The Government established through Nebesny that no work was performed on the Johnson Avenue job on February 10, 1969, due to a snowfall of 15-20 inches (1369a-1370a),

whereas a charge for trucking services allegedly rendered on that date was included in one of the invoices here in question. The Government also introduced reports filed by both Nebesny and Paterno & Sons, Inc. for the months of October and November 1968, which were in agreement as to the number of trucks listed for the Johnson Avenue site during those months (1378a-1379a).

There was also testimony by a representative of the IRS to the effect that if the deductions taken in the corporate tax returns for the corporation's fiscal years 1967 through 1970 in the amounts represented by the checks to the five payees in question were totally disallowed, there would be an aggregate deficiency of $74,112.18 (1417a-1430a).

Apart from a number of character witnesses who testified on behalf of the individual defendants, the defense consisted of an effort to establish that the corporate defendant had, in fact, incurred the trucking expenses taken as deductions on its income tax returns, even though such expenses were represented by checks payable to truckers who might have used fictitious names in their billings for purposes of their own. It is defendants' position, as more fully shown in Point II, *infra,* that the trial court committed prejudicial error and denied them a fair trial by improperly demeaning their defense in the presence of the jury and by making a number of erroneous rulings which hampered the presentation of such defense. Neither of the individual defendants took the stand.

At the close of the Government's case (1444a-1445a), and again at the close of the entire case (1680a-1683a), counsel for defendants Paterno and Paterno & Sons, Inc. moved for a dismissal of each of the eight counts of the indictment embodying the charges against them, and for judgments of acquittal, on the ground that the Government had failed to meet its burden of proof. These motions were denied by the District Court.

POINT I

Defendants Michael Paterno and Paterno & Sons, Inc. were entitled to judgments of acquittal since the evidence was insufficient as a matter of law to establish the requisite elements of wilfulness, guilty knowledge and criminal intent on their part.

In order to convict defendants Michael Paterno and Paterno & Sons, Inc. of the crimes with which they were here charged—conspiracy to violate 26 U.S.C. § 7201 and substantive violations of 26 U.S.C. §§ 7201 and 7206(1), it was necessary for the Government to establish, among other elements, that said defendants had acted wilfully and knowingly and with criminal intent.

It is thus settled that a defendant charged with having violated 26 U.S.C. § 7201 must be shown to have "acted wilfully and knowingly with the specific intent to evade the tax." *United States* v. *Coblentz,* 453 F.2d 503, 505 (2d Cir.), cert. den. 406 U.S. 917; *Spies* v. *United States,* 317 U.S. 492, 497-9; *United States* v. *Berger,* 456 F.2d 1349, 1352 (2d Cir.). "A willful evasion of the tax requires an intentional act or omission as compared to an accidental or inadvertent one", as well as "a specific wrongful intent to conceal an obligation known to exist * * *." *United States* v. *Martell,* 199 F.2d 670, 672 (3d Cir.).

A charge of conspiracy to evade taxes in violation of 26 U.S.C. § 7201 likewise requires proof of knowledge on the defendants' part of the existence of the tax liability in question, together with "*at least* the degree of criminal intent necessary for the substantive offense itself". *Ingram* v. *United States,* 360 U.S. 672, 678 (emphasis the Court's).

It has similarly been held that wilfulness, in the sense of "bad faith or evil intent", and guilty knowledge and criminal intent are also essential elements of the crime defined by 26 U.S.C. § 7206(1). *United States* v. *Bishop,* 412 U.S. 346, 36 L.Ed.2d 941, 951.

Indeed, the indictment itself charged that the defendants had "wilfully and knowingly" entered into the conspiracy

to violate 26 U.S.C. § 7201 (9a); that they had "wilfully and knowingly" attempted to evade a large portion of the corporate income tax due and owing by the corporate defendant (13a); and that defendant Paterno had likewise acted "wilfully and knowingly" in subscribing false corporate income tax returns (15a).

It is submitted that the evidence was insufficient as a matter of law to establish the requisite elements of wilfulness, guilty knowledge and criminal intent on the part of defendants Paterno and Paterno & Sons, Inc., and that the trial court erred in denying their motions for judgments of acquittal (1444a-1445a, 1680a-1683a).

The Government's proof showed that during the period between June 1965 and July 1969 the corporate defendant had issued some 48 checks to five certain payees—Michael Catenzaro, Arthur Lazravitch, Thomas Tuccella, Anthony Ferrotta, and John Aurrichio—purportedly for trucking expenses in connection with the necessary work of hauling away excavated earth; that most of such checks were signed by defendant Paterno, as president of the corporate defendant, though some of them were signed by another corporate officer, Thomas Cohill; that deductions were taken for the amounts represented by such checks in the corporate defendant's income tax returns for the fiscal years ended February 28, 1966, February 28, 1967, February 29, 1968, February 28, 1969 and February 28, 1970, respectively; that the five payees could not be located at the addresses or telephone numbers listed on the invoices submitted by them to the corporate defendant; and that no record of such payees could be found in governmental agencies such as the Internal Revenue Service, the Postal Service, the New York Department of Motor Vehicles, the New York Department of Taxation and Finance and the New York Workmen's Compensation Board, or in labor unions dealing with truckers. On the basis of such evidence, the Government urged that an inference could reasonably be drawn that the five payees were fictitious.

The Government, however, admitted that it had no knowledge or proof as to who received the monies repre-

sented by the checks payable to the order of the said five payees (1827a, 1845a). The Government likewise made no effort to prove that the truck haulage work—for which the monies represented by the said checks were purportedly paid—was never performed.

The Government did adduce evidence relating to defendant Denti which, however, could in no way be applicable to defendant Paterno. The Government's proof thus showed that officers of the bank which cashed most of the said 48 checks did so only after obtaining approval therefor by telephone from defendant Denti (350a, 400a-402a); that the endorsements of the payees' names on five of the checks were in the handwriting of defendant Denti (840a, 842a-848a); and that Denti had given a statement to the IRS indicating that one of the five payees, Aurrichio, and probably also another, Catenzaro, had been hired through Taff Trucking, a firm which did trucking work for Paterno & Sons, Inc. (1145a-1147a), whereas the owner of Taff Trucking, Salvatore Minichino, testified that he had never arranged for any trucker by the name of any of the five payees to work for Paterno & Sons, Inc. and did not know any such truckers (628a-630a).

There was not an iota of evidence to show that defendant Paterno had ever arranged for the cashing of any of the checks in question or had ever authorized any bank officer or anyone else to cash any of such checks, or that he had anything to do with the endorsements on the back of said checks, or that he had in any way received, or had anything to do with, the proceeds of any of such checks.

Assuming, *arguendo*, that the Government's proof was sufficient, *prima facie*, to show the impropriety of the deductions taken in the corporate tax returns for the expenses purportedly represented by the checks in question, merely by showing that the payees in such checks were not the names of actual persons or firms, without also showing that the work for which such expenses were purportedly incurred was never performed, there was a complete absence of evidence to show that either defendant Paterno or the corporate defendant had any knowledge that any

of the five payees were fictitious or non-existent or acted otherwise than in the good faith belief that the payees to whose order the checks in question were drawn were the names of actual persons who were entitled to receive such checks for trucking equipment and services furnished to the corporate defendant.

The evidence offered by the Government in an effort to establish the elements of guilty knowledge, wilfulness and criminal intent on the part of the defendant Paterno—and through Paterno, on the part of the corporate defendant —was wholly circumstantial and of the most tenuous and equivocal nature and it added up at most only to suspicion. As Justice Tom Clark, formerly Associate Justice of the Supreme Court, recently pointed out, "the courts have always held that 'suspicion, however strong, is not proof and will not serve in lieu of proof.' ". *United States* v. *Jensen,* 462 F.2d 763, 765 (8th Cir.), quoting from *Causey* v. *United States,* 352 F.2d 203, 207 (5th Cir.).

It is settled that "willfulness involves a specific intent which must be proved by independent evidence and which cannot be inferred from the mere understatement of income." *Holland* v. *United States,* 348 U.S. 121, 139. So, in the present case the mere fact that defendant Paterno had signed corporate checks to the order of payees who turned out to be fictitious, would not be sufficient of itself to support a finding of wilfulness or criminal intent on his part.

The evidence on which the Government relied to establish the elements of guilty knowledge, wilfulness and criminal intent on the part of defendant Paterno consisted of (1) the testimony of O'Reilly and Mrs. Ferraro as to the statements made to them by Paterno relating to the five payees in question, which statements, the Government urged, warranted an inference of consciousness of guilt on Paterno's part, and (2) the evidence relating to the practice followed with respect to the payment of invoices, which evidence, the Government contended, showed that Paterno departed from his usual practice in dealing with the invoices of the five payees in question.

As shown above, O'Reilly testified that what Paterno said to him was that "There are some trucks we said we had and they are saying we didn't have", or phrased somewhat differently, "They are questioning some trucks we claim we did have and they say we didn't have" (1260a-1262a). Mrs. Ferraro's testimony was that what Paterno told her was that whereas "they claimed that these truckers do not exist", "He said they did" (1112a).

There was also testimony by Andretta, the former officer of the Royal National Bank, to the effect that in a conversation which he had with Paterno and Denti prior to his appearance before the Grand Jury, either Paterno or Denti referred to the checks in question as being "payable to truckers who had performed work for them" (405a-406a). However, since Andretta was unable to specify whether it was Paterno or Denti who made that statement (405a-406a), his testimony cannot be taken as proof that it was made by Paterno. In any event, however, the statement to which Andretta testified is similar to the statements which O'Reilly and Mrs. Ferraro testified were made to them by Paterno. All three statements amounted to nothing more than a denial of the claim advanced by the Government that the checks in question were payable to the order of fictitious payees.

The Government apparently contends that since its proof established the non-existence of the payees in question, the statements made by Paterno, to the effect that such payees were existent persons, fall squarely within the ambit of the rule that "exculpatory statements, when shown to be false, are circumstantial evidence of guilty consciousness and have independent probative force." See *United States* v. *Lacey*, 459 F.2d 86, 89 (2d Cir.). It is submitted, however, that that rule is not here applicable, since there is no evidence that the statements in question, if false, were made by Paterno with knowledge of their falsity, and that, in any event, such false exculpatory statements would not in themselves be sufficient to prove guilty knowledge on Paterno's part.

Manifestly, there would be no basis or warrant for drawing an inference of a defendant's consciousness of guilt by reason of his having made a false exculpatory statement, unless he had knowledge of its falsity. The very concept of consciousness of guilt necessarily implies a mental state in which the actor is fully conscious of the fact that he is making a false statement, and it has no place where the person making the statement in good faith believes that it is true.

Thus, in the cases in which probative force has been accorded to a false exculpatory statement, the statement has invariably related to facts, the truth or falsity of which is necessarily personally known to the defendant, so that proof of the falsity of the statement also establishes the defendant's knowledge of such falsity. E.g., *United States* v. *Smolin,* 182 F.2d 782, 786 (2d Cir.) (denial by defendant that he knew his confederates in crime); *United States* v. *Farina,* 218 F.2d 62, 63 (2d Cir.) (same); *United States* v. *Kirkpatrick,* 458 F.2d 864, 867 (7th Cir.) (same); *United States* v. *Trudo,* 449 F.2d 649, 651 (2d Cir.) (denial by defendants that they had been together at a particular time and place); *United States* v. *Lefkowitz,* 284 F.2d 310, 316 (2d Cir.) (denial by defendant that he had ever been at the place of the theft involved); *United States* v. *Wilson,* 342 F.2d 43, 44-5 (2d Cir.) (same; also false information given by defendant concerning his residence and employment); *United States* v. *Massarotti,* 462 F.2d 1328, 1330 (2d Cir.) (false statements by defendant that he had just arrived at the scene of the crime in a taxicab); *United States* v. *De Alesandro,* 361 F.2d 694, 698 (2d Cir.) (false statement by defendant charged with jury tampering that she didn't know of the trial in question and had nothing to do with any juror in such trial).

In the present case, on the other hand, the question whether the five payees in question were existent or non-existent, was not a matter of which defendant Paterno necessarily had personal knowledge. Indeed, the burden was on the Government to establish, among other elements, not only that the said five payees were non-existent, but

that defendant Paterno had knowledge thereof when he signed the checks to such payees and thereafter signed the corporate income tax returns. To accept the Government's contention that an inference of consciousness of guilt on Paterno's part—and on the basis thereof, a further inference of guilty knowledge on his part—could be drawn merely because of statements made by Paterno in which he disputed the Government's claim as to the non-existence of such payees, would in effect permit the Government to obtain a conviction of Paterno without actually proving the essential elements of guilty knowledge, wilfulness and criminal intent on his part.

Furthermore, as is hereinafter more fully shown, regardless of what knowledge co-defendant Denti may have had as respects the matter of the five payees, it is submitted that there is no evidence whatever to show that defendant Paterno at any time acted otherwise than in the *bona fide* belief that the payees were existent persons to whom monies were due from the corporate defendant for trucking equipment and services furnished by them. Indeed, the witnesses O'Reilly, Mrs. Ferraro and Andretta all testified that Denti made similar statements to them (409a, 1113a, 1263a, 1264a), and Paterno might well only have been repeating what Denti had told him in addition to expressing his honest belief that the checks he had signed represented actual corporate obligations payable to existent persons.

In any event, there was not the slightest evidence that Paterno made the allegedly false statements here involved with knowledge of their falsity, and there was therefore no basis for invocation of the rule relating to false exculpatory statements. See also *Rizzo* v. *United States,* 304 F.2d 810, 830 (8th Cir.), where the court expressly approved an instruction to the jury that an inference of consciousness of guilt could be drawn from a false exculpatory statement only if the defendant had made the statement "willingly and *with knowledge of the falsity*" (emphasis supplied). *Cf. Ashcraft* v. *Tennessee,* 327 U.S. 274, 278, where the analogous rule relating to the inferences that may be drawn from a showing that the defendant concealed

material facts was phrased in terms of a "[*w*]*ilful* concealment" of such facts (emphasis supplied).

Furthermore, the mere fact that defendant Paterno may have made false exculpatory statements would not be sufficient, of itself, to warrant his conviction. *United States* v. *McConney,* 329 F.2d 467, 470 (2d Cir.); see *United States* v. *Lacey, supra,* 459 F.2d at 89-90; *United States* v. *DeVito,* 68 F.2d 837, 839 (2d Cir.); *Scott* v. *United States,* 232 F.2d 362, 363-4 (D.C. Cir.).

In *United States* v. *McConney, supra,* the defendant was charged with having knowingly transported his wife from Albany, New York to Bridgeport, Connecticut in June 1961 for the purpose of prostitution. There was proof that the defendant and his wife resided in Albany and that at the time involved both the defendant and his wife were present in Bridgeport, where the wife engaged in prostitution at a certain house of ill fame maintained by a Mrs. Ferguson. There was also proof that the defendant had made certain statements to an F.B.I. agent, which were shown to be false, to the effect that he had only been in Bridgeport once in his life, almost 20 years earlier, and that during the period in question he had been at work elsewhere. The defendant further told the F.B.I. agent that he had not transported his wife from Albany to the particular house of ill fame in Bridgeport. As regards the latter statement, this Court pointed out that there was "no positive evidence" to establish the falsity of the statement. As regards the other statements, however, even though such statements were shown to be false and even though the defendant necessarily had knowledge of their falsity, this Court held as follows (329 F.2d at 470):

> "The trouble is that appellant's statement to the agent that 'he had not transported Ernestine [his wife] from Albany, New York to any place in the United States for the purpose of prostitution,' was not shown to be false by other evidence. There is no evidence to show that appellant ever intended his wife to engage in prostitution or that he knew that the Ferguson's home was a house of prostitution. It would place too much weight on defendant's extra-

> judicial exculpatory statement to authorize a conviction based almost solely on the fact that part of the statement, not involving the corpus delicti of the crime, was shown to be false. The other evidence of guilt was extremely weak, and we do not think the statement was sufficient independent proof to justify denial of the motion for acquittal. None of the decisions cited by the government require a different holding."

In *United States* v. *Lacey, supra,* the defendant was charged with attempting to pass a counterfeit federal reserve note and with possession and concealment of a second counterfeit note immediately following his arrest. The defendant told the officers that he did not know that the notes were counterfeit. He also stated that he had received such notes as part of his payment as a plumber, but that statement was shown to be false by his own admission shortly thereafter that he was in fact unemployed as well as by a second exculpatory statement, inconsistent with his initial statement, to the effect that he had found the notes on the street near the bus stop. The defendant also denied having made the initial statements to the police officer.

In holding that the evidence was sufficient to permit an inference that the defendant knew that the notes were counterfeit, this Court made it clear that it was doing so on the basis of the defendant's inconsistent and incredible explanations as to how he obtained possession of the counterfeit notes (459 F.2d at 90). The Court held that by reason of such conflicting and incredible explanations, the McConney decision was "factually distinguishable", and the Court emphasized (at p. 90):

> "* * * We do not hold that this [initial] false exculpatory statement in itself would be sufficient to prove knowledge. * * *"

So also in *United States* v. *DeVito, supra,* in which the defendants were charged with the operation of an illegal

still, this Court held (68 F.2d at 839):

> "* * * Their [the defendants'] presence there with the still in operation was a suspicious circumstance. So was the fact that the addresses they gave did not prove to be correct when investigated. If suspicious circumstances were enough, the evidence would be sufficient to support the conviction. But that is not enough of course. * * *"

Akin to the doctrine relating to false exculpatory statements, an inference of consciousness of guilt may also be drawn from proof of flight by the defendant or proof of his fabrication of an alibi. But the courts have similarly consistently held that such evidence of itself—without other adequate evidence of guilt—is not sufficient to support a conviction. *Wong Sun* v. *United States,* 371 U.S. 471, 483, fn. 10 (proof of flight); *Vick* v. *United States,* 216 F.2d 228, 233 (5th Cir.) (same); *United States* v. *Ford,* 237 F.2d 57, 63, fn. 10 (2d Cir.) (fabrication of alibi: "* * * Of course, standing alone, such evidence would not be sufficient to support a conviction"); *Cooper* v. *United States,* 218 F.2d 39, 41 (D.C. Cir.) (same).

As noted above, the Government further attempted to show that the practice followed by defendant Paterno with respect to the issuance of checks to the order of the five payees in question was different from the practice he followed with respect to other truckers, and the Government contended that an inference could be drawn therefrom of guilty knowledge on Paterno's part. It is submitted, however, that no adverse inference of any kind can be drawn against Paterno from the Government's evidence.

The checks in question, like the company's other checks, were prepared by the young women who worked in the office and were signed by defendant Paterno, or, in some instances, by Thomas Cohill. All the checks to the five payees in question were issued against invoices typed on printed letterheads of such payees.

Mrs. Ferraro, who was the company's bookkeeper from 1964 to about May 1968, when she was succeeded by her

sister, Mrs. Altro, testified that whenever she presented a check to Paterno for signature, she always presented back-up or substantiation material with it (1115a), and that Paterno would never sign a check "without having substantiation to show that that payment was due and owing" (1123a). Miss Nunkin similarly testified that no check was ever presented to Paterno for signature where she was present without back-up or substantiation material (1033a).

Mrs. Altro likewise testified that Paterno never signed a check to her knowledge without back-up material of some kind (755a-757a) and that the same practice was followed by Cohill who was also authorized to sign checks (759a). It was primarily, however, on the basis of Mrs. Altro's testimony that the prosecutor relied in support of his contention that Paterno did not follow his usual practice in paying the invoices of the five payees in question (1794a-1796a).

Specifically, the prosecutor relied on Mrs. Altro's testimony that she never presented a check to Paterno for signature where there were no delivery tickets attached to the invoices, and that her practice was to staple the delivery tickets to the invoices (678a, 692a). On the basis of that testimony, the prosecutor contended that the absence of staple marks on many of the invoices in question would necessarily establish that Paterno had signed checks for the charges represented by such invoices without any substantiation by way of delivery tickets attached thereto (1796a, 1812a).

In the first place, however, the prosecutor's contention with respect to the absence of staple marks on many of the invoices would at most apply only to the period from and after May 1968 when Mrs. Altro was in charge of the preparation of checks.* Thus, Mrs. Ferraro testified that dur-

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* The prosecutor's claim that 80% of the invoices in question did not have any staple marks on them (1796a) appears to have been an estimate based on all the invoices for the entire period here involved, rather than merely the invoices for the shorter period of Mrs. Altro's tenure.

ing her tenure she would attach delivery receipts to the invoices only *where such receipts were available,* and she did not specify how she would attach them, whether by paper clip or by staple (1097a-1098a). Furthermore, Mrs. Ferraro also testified that there were occasions when there were no receipts for particular rentals and that on such occasions she would "usually refer right to the cost sheet because all the equipment on the job had to be listed on the cost sheet" (1098a-1099a).

In short, Mrs. Ferraro's testimony made it clear that the substantiation on which Paterno insisted before signing any check could consist of material other than delivery receipts and that, in any event, the delivery receipts could have been attached to the invoice by paper clips, thus not leaving any staple marks. It may be noted, in this connection, that there are several invoices in evidence, representing truck rental charges from an unquestionably legitimate trucker, Cross County Trucking Co., dated June 1, 1966 and June 30, 1966, respectively, which do not appear to have any staple marks (G. Exhs. 106, 107).

Furthermore, the prosecutor's contention based on the absence of staple marks must in any event be rejected, in view of the statement made by Mrs. Altro to the IRS, which she affirmed in her testimony, to the effect that there were occasions when "George Denti would instruct her to prepare checks without delivery receipts" and would tell her "that he, George Denti, would explain the lack of substantiation to Mike Paterno", and that on such occasions Denti would take the checks himself to Paterno for the latter's signature (685a-692a).

Obviously, there would be no basis for drawing any adverse inference against Paterno merely from evidence that on some occasions, on the basis of some explanation given to him by Denti, Paterno would sign checks even in the absence of delivery receipts. Furthermore, to attempt to draw an inference of guilty knowledge on Paterno's part by speculating as to what Denti may have told him, would amount to an impermissible resort to suspicion instead of proof. *United States* v. *Cirillo,* 493 F.2d —— (2d Cir.),

decided May 7, 1974; *United States* v. *Jensen, supra,* 462 F.2d 763, 765 (8th Cir.); *United States* v. *Barnes,* 383 F.2d 287, 291 (6th Cir.) ("mere suspicion that . . . [two of three partners engaged in a local gambling enterprise] must have known, or reasonably could have been expected to know, about Barnes' [the third partner's] conduct would not suffice").

As this Court recently held in *United States* v. *Cirillo, supra,* in reversing the conviction of one Gutierrez in a narcotics conspiracy case for insufficiency of evidence, though there was evidence that one of the conspirators, Venetucci, had two clandestine meetings with Gutierrez which lasted for two and four hours respectively (Slip Opinion, May 7, 1974, pp. 3318-9):

> "*While the two visits raise suspicion, suspicion is not enough.* For all we know Venetucci may have visited Gutierrez in an unsuccessful effort to induce him to become a member of the conspiracy. Possibly he was visiting him in an unsuccessful effort to borrow the money he needed in order to fulfill his unlawful commitment to Sorrentino and Cirillo. *Absent some proof of knowing participation by Gutierrez in the unlawful venture we can conceive of any number of perfectly legitimate conversations or transactions that might have been the subject of the visits.* * * *." (Emphasis supplied).

So in the present case Denti could obviously have given Paterno some reasonable explanation for the unavailability of delivery receipts. For example, Denti might well have informed Paterno that the particular invoice was substantiated by the cost sheet, even though there were no delivery receipts available with the cost sheet. Thus, Mrs. Ferraro testified that the practice during her tenure was to treat a listing of a particular truck rental on the cost sheet as itself sufficient substantiation even without delivery receipts (1098a-1099a). Mrs. Altro similarly testified that while it was her practice to attempt to obtain missing delivery receipts from the trucker involved,

it would not be necessary for her to do so if the particular truck rental was listed on the cost sheet (763a-764a).

Moreover, there was nothing in Mrs. Altro's testimony to show that it was only in connection with invoices from the five payees in question that Denti gave her instructions such as she testified to. So far as the evidence shows, Denti might have followed the same practice with respect to invoices from other truckers. Indeed, not all the invoices paid by the corporate defendant during the period in question were introduced into evidence, and there was nothing to show that there were staple marks on all the invoices paid during that period which had been received from the many unquestionably legitimate truckers with whom the corporate defendant dealt.

In point of fact, in order to justify an inference of guilty knowledge on Paterno's part from the foregoing evidence, it would be necessary to pile inference upon inference on the basis of a number of speculative assumptions having no evidentiary support whatever; namely, that there was no substantiation for the particular invoices in the cost sheets or elsewhere, and that Denti either gave Paterno no explanation at all for the absence of delivery receipts or gave him a specious explanation by which Paterno should not have been deceived. Manifestly, such speculation would in no way meet the requirement that "the evidence of knowledge must be clear, not equivocal" and cannot "be made out by piling inference upon inference". *Ingram* v. *United States, supra,* 360 U.S. at 680.

Furthermore, even negligence on Paterno's part in permitting himself to be deceived by Denti would not be sufficient to establish that Paterno himself had acted with the requisite wilfulness, guilty knowledge and specific intent. It is thus settled that "terms such as willful and knowingly are to be taken as meaning 'deliberately and with knowledge' * * * in contrast to 'something which is merely careless or negligent or inadvertent.'" *Standard Oil Company of Texas* v. *United States,* 307 F.2d 120, 130 (5th Cir.). See also *United States* v. *Quinn,* 141 F. Supp. 622, 627 (S.D.N.Y., Weinfeld, J.) ("it is not sufficient to find that

as a reasonable person Quinn should have known the facts"; there must be sufficient evidence to warrant a "finding that in fact he had actual knowledge").

Nor was any of the other evidence on which the Government relied sufficient to establish the requisite elements of wilfulness, guilty knowledge and specific intent on Paterno's part.

The prosecutor stressed the fact that the invoices in question were in substantial amounts which were larger than the amounts of other invoices billed to the company for truck rental expenses (1840a). However, the invoices all appeared to be regular and genuine on their face, and Paterno was not required personally to check into each invoice, nor would he have had the time to do so. Thus, Mrs. Ferraro testified that there were "hundreds of bills in that office" (1097a), and Mrs. Altro similarly testified that there were "thousands of checks" signed during the two and one-half year period of her employment with the company (757a-758a).

The prosecutor also stressed evidence showing that there was a delay of about 10 months in the payment of one of the invoices in question in 1968 and that two invoices entered on the company's books in May and November 1969, respectively, were never paid (717a-718a, 1799a, 1805a-1807a). There was no evidence, however, to show that Paterno had anything to do with the delay in payment or the non-payment of such items, or that he had any knowledge thereof, or that there was any basis for inferring guilty knowledge on Paterno's part by reason thereof. As a matter of fact, there was evidence to show that there were also substantial delays in paying the invoices of unquestionably legitimate truckers (766a-773a), and that it was the company's practice, when its cash position was low, to withhold payment of charges incurred on a particular municipal or government agency job until the company received payment for the job (719a, 1122a-1123a).

In short, there was a complete absence of evidence to establish that Paterno acted herein knowingly and wil-

fully and with specific intent to evade the corporate defendant's tax liability. There is likewise no basis or warrant for sustaining the conviction of the corporate defendant.

The only possible ground on which the corporation's conviction could be upheld would be that there is sufficient evidence to establish the requisite elements of criminal liability herein against defendant Denti and that defendant Denti's willful acts may be imputed to the corporate defendant on the theory that a "corporation may be held criminally liable for the acts of an agent within the scope of his employment." *Cf. United States* v. *George F. Fish, Inc.,* 154 F.2d 798, 801 (2d Cir.), cert. den. 66 S. Ct. 1377.

It is settled, however, that a corporate officer's or agent's illegal conduct under a statute requiring a showing of a specific wrongful intent will not be imputed to the corporation if such conduct was undertaken solely to advance the officer's or agent's personal interests and was contrary to the interests of the corporate employer. *Standard Oil Company of Texas* v. *United States,* 307 F.2d 120, 129 (5th Cir.); see also *United States* v. *Carter,* 311 F.2d 934, 942 (6th Cir.). As was held in *Standard Oil Company of Texas* v. *United States, supra,* 307 F.2d at 129:

> "* * * Under a statute requiring that there be 'a specific wrongful intent,' and the 'presence of culpable intent as a necessary element of the offense * * *,' the corporation does not acquire that knowledge or possess the requisite 'state of mind essential for responsibility,' through the activities of unfaithful servants whose conduct was undertaken to advance the interests of parties other than their corporate employer."

As the trial judge charged the jury, it was essential for the Government to establish, among other elements, that the truck rental expenses for which deductions had been taken in the corporate defendant's income tax returns had been substantially overstated (1864a-1865a); i.e., that deductions had been taken for truck rental expenses which had not been incurred. Actually, however, the corporation had expended monies for the expenses in question, and if

such expenses had not in fact been incurred, whoever had wilfully and knowingly diverted corporate funds for the payment of such fictitious expenses had obviously acted contrary to the interests of the corporation and for his own personal interests.

If it were to be assumed, *arguendo,* that the evidence was sufficient to show that Denti had knowingly and wilfully caused the checks in question to be prepared and signed for the aforementioned purposes, his conduct would manifestly have been contrary to the interests of the defendant corporation and there would accordingly be no basis or warrant, under the foregoing authorities, for imputing Denti's wilful conduct to the corporate defendant. *Standard Oil Company of Texas* v. *United States, supra,* 307 F.2d at 129.

It is accordingly submitted that defendants Michael Paterno and Paterno & Sons, Inc. are entitled to judgment of acquittal because of the insufficiency of the evidence to establish the requisite elements of wilfulness, guilty knowledge and criminal intent on their part.

POINT II

Defendants were denied a fair trial, as required by due process, by reason of the action of the trial court in demeaning their defense in the presence of the jury and in erroneously hampering the presentation of their defense.

The basic thrust of the Government's charges against the defendants herein was that the major portion of the deductions taken in the corporate defendant's tax returns for the expense of carting away excavated earth from the jobs on which the corporate defendant was engaged, represented fictitious expenses which had not actually been incurred. As shown above, the Government made no attempt to prove that the expenses which it claimed to be fictitious had not actually been incurred by the corporate defendant and, instead, it presented proof merely to show that the payees of the checks issued by the cor-

porate defendant for the payment of such expenses were not the names of actual persons or firms.

On the other hand, by way of defense, defendants sought to prove that regardless of whether the payees in question were or were not fictitious, the monies represented by the checks payable to such payees had actually been expended by the corporate defendant for the necessary work of hauling away excavated earth from the job sites involved. They sought to establish that defense by expert testimony that the necessary work of hauling that was involved, reasonably required the expenditures made therefor by the corporate defendant, including the amounts represented by the checks to the payees in question, and that the work could not possibly have been performed at the substantially lower amounts which remained after disallowing the monies paid to the five payees in question, in accordance with the Government's claims herein. However, the efforts of the defense in that regard were met with derisive comments by the trial court, together with statements by the trial court in the presence of the jury that the only issue involved was whether the five payees in question were or were not existent truckers, and rulings which, it is submitted, erroneously hampered the defendants' presentation of their defense.

The facts sought to be established by the foregoing defense would also have confirmed that defendant Paterno had acted in good faith—and not wilfully or with guilty knowledge or specific criminal intent—in signing the checks to the five payees in question for excavation hauling expenses (*cf.* Point I *supra*).

In its charge to the jury the trial court seemed to recognize that the defense in question was a valid one. The court thus stated (1902a-1903a):

> "Finally the defendants argue that even if the truckers were non-existent and even if they may have known those truckers were non-existent, the government has not proved beyond a reasonable doubt that these truck rental expenses in approximately the amount in ques-

> tion were not paid to some truck renter for expenses of this nature, and on this basis the defendants urge that they cannot be convicted for attempted evasion of taxes or false statements of business expenses or conspiracy to commit any violations of this nature.
>
> "The defendants have argued in this connection that the bills, the invoices that are in the exhibits numbered, with some omissions, 1-A to 47-A were in fact paid—those amounts were in fact paid for required trucking services rendered to Paterno & Sons, Incorporated."

It is submitted, however, that the trial court's erroneous statements and rulings during the course of the trial had irrevocably prejudiced the presentation of the defendants' defense, with the result that the damage was beyond repair at the stage of the charge to the jury.

In his opening to the jury, the prosecutor stated that the only issue was whether the five payees in question "ever exist[ed]" and whether Paterno and Denti "knew that these truckers did not exist" (95a-96a). The trial court likewise early stated, though not in the presence of the jury, that that was the basic issue in the case (735a-736a). Thereafter, when the defendants sought to introduce certain photographs and plans as a foundation for their defense, the court excluded the proffered documents (1293a-1294, 1307a-1308a), and made clear its view, *in the presence of the jury*, that "the issue in the case" was "whether these five truckers, or any of them, were existent or non-existent" (1315a-1316a), and that any evidence along the lines of the defendants' announced defense which did not meet the issue as to the existence of the payees would be excluded as irrelevant (1315a-1317a).

At a later point, after defense counsel's elaboration of what he planned to prove in support of the aforementioned defense, and when he stated that he planned to have an expert testify as to the cost entailed in hauling away the earth excavated from the corporate defendant's various job sites, the trial court derisively stated (1324a):

> "All right. You tell him I am going to allow that. I am going to allow that to go to this jury and I am going to

have that sent, then, *to a grand jury* to be studied." (Emphasis supplied.)

After objection by defense counsel that the trial court's remarks amounted to "intimidation", the court further stated that the defense "seems to border on fantasies" and that "further scrutiny" would be appropriate "if the defense is going to be . . . [that the money] was all spent and nobody knows any of these five people with the enormous sums of money that are shown to have been paid out to them" (1324a-1325a).

The trial court subsequently stated that it was withdrawing its prior critical remarks, but it made that statement outside the jury's presence (1402a) and the jury was never informed that the trial court had in any way altered the views previously expressed by it in their presence that the only issue in the case was whether the five payees in question did or did not exist and whether the individual defendants had knowledge thereof.

As a matter of fact, at a later point when defendants' expert witness, Daniel J. O'Connell, was on the stand and defense counsel handed the invoices of the five payees in question to O'Connell and sought to adduce his testimony as to whether the expenditures reflected by those invoices were consistent with O'Connell's estimates of the necessary costs involved, the trial court again vitiated the defense efforts by referring, in the presence of the jury, to the five payees as *"these five alleged truckers whose existence is central in this case"* (1616a; emphasis supplied).

There were also other rulings by the trial court which, it is submitted, erroneously hampered the defendants' presentation of their defense.

The initial defense witness was to have been James O'Reilly, who testified as a witness for the Government under a grant of immunity. On cross-examination, defense counsel attempted to elicit testimony from O'Reilly and introduce certain documentary evidence through his

testimony, to serve as a foundation for subsequent expert testimony as to the cost incurred by the corporate defendant for trucking expenses in hauling away excavated earth (1323a-1331a). This led to a series of exclusionary rulings by the trial court (1292a, 1294a, 1315a-1317a). The court then ruled that it would permit defendants to introduce evidence in support of their defense, but that they would have to call O'Reilly as their own witness on their case for that purpose (1331a).

When O'Reilly was thereafter called by the defendants as their witness, the trial court immediately interrupted to advise defense counsel and O'Reilly that the grant of immunity with which he had been clothed as a Government witness would not extend to any testimony which he would be giving as a defense witness (1458a). Following a lengthy dialogue on the subject, part of which occurred out of the witness' presence, O'Reilly was asked if he intended to invoke his Fifth Amendment privilege, to which he replied, "No sir" (1469a). Additional prodding by the court, however, apparently created such doubt and confusion in O'Reilly's mind that he eventually stated that "maybe I should have immunity again" (1470a). Whereupon he was excused by the trial court to seek legal advice (1471a). O'Reilly did not subsequently reappear as a witness.

The vital part of the defense was to be the testimony of the aforementioned Daniel J. O'Connell, a consulting engineer and former associate professor in the Manhattan College School of Engineering, whose expertise was stipulated to by the prosecution (1505a-1509a). The defense attempted to establish through O'Connell's expert testimony, the trucking expenses necessarily incurred by the corporate defendant for hauling away excavated earth on three of the five jobs on which such trucking expenses were incurred.

O'Connell testified that he had examined the specifications for those three jobs—i.e., the Carmel, Watson Avenue and Johnson Avenue jobs—and that he concluded

therefrom that an aggregate of 141,507 cubic yards of dirt were excavated on those three jobs (1509a-1511a). He further testified that since excavated soil expands in volume by 15 per cent, once it is no longer in compacted form, he estimated, on the basis of that factor and certain other factors, that the total amount of dirt to be hauled away from the three job sites was 188,000 cubic yards (1632a). The specific amounts of dirt carted away on the three jobs, according to O'Connell, were 70,944 cubic yards on the Carmel job, 54,924 cubic yards on the Watson Avenue job, and 62,538 cubic yards on the Johnson Avenue job (1519a, 1520a, 1549a).

O'Connell further testified that the trucks used for excavation hauling during the period in question had a capacity of 10 cubic yards each (1518a-1519a). He was also permitted to testify as to the cost per day of renting a truck with a driver during that period, by reference to the rates charged in various invoices in evidence (1621a-1622a).

It was a simple matter of arithmetic to determine the number of truckloads that would be required to haul away all of the excavated dirt on a particular job by dividing the total number of cubic yards by 10 (each truck load amounting to 10 cubic yards). O'Connell thus pointed out, with specific reference to the Watson Avenue job, that 5,492 truckloads at 10 cubic yards per load would be required to haul away all of the 54,924 cubic yards of excavated dirt on that job (1549a-1550a). The total cost of such 5,492 truckloads would depend on how many loads each truck could cart away during a working day, and that in turn would depend on such factors as the mileage involved in a round trip for each truck between the job site and the dump site, and the time required for the truck to load at the job site, drive to the dump site, unload there and then return to the job site for another load (1568a-1569a).

Though O'Connell was fully qualified, it is submitted, to give his expert opinion with respect to the foregoing

matters, and on the basis thereof to readily calculate the cost of each job—as O'Connell was prepared to do, the court repeatedly prevented defendants from developing the evidence, through O'Connell, with respect to those bottom line figures (1550a-1554a, 1564a-1571a, 1576a-1589a, 1613a-1614a, 1622a-1623a).

As regards the Watson Avenue job, O'Connell testified that for the purpose of estimating the foregoing factors, he had selected the shortest route from the job site to the dump site, making for a round trip of 10.8 miles (1562a). He also testified that he was familiar with the traffic conditions, the stoplights, the legal speed limit of 25 miles per hour, in addition to which he knew that a loaded dump truck travels at about 20 miles an hour, and indeed "can't do 25". Additionally, he estimated the loading time at the job and the somewhat small dumping time at the dump site. He also subtracted one hour a day from the normal eight hour work day for coffee breaks, etc. (1567a-1569a). Based on these factors, he was prepared to estimate the number of trucks involved on this job, but he was not permitted to do so.

O'Connell was likewise not permitted to give his estimate as to the amount of trucking required for the Carmel job (1574a-1576a), notwithstanding that he had personal knowledge of the conditions on that job since he had served as an expert consultant on that job (1574a) and had personally traversed the area (1573a).

O'Connell was not permitted to answer either hypothetical or direct questions which would have enabled the jury to determine whether the actual trucking costs of these jobs accorded with the figures claimed on the corporate tax returns (1609a-1614a, 1622a-1623a).

It is submitted that the trial court erred annd abused its discretion in barring O'Connell's testimony. It has been aptly observed that "all expert testimony is admissible if it reasonably tends to aid the trier in the resolution of the decisive issue, and is not a mere guess or conjecture" (see *Padgett* v. *Burton-Smith Mercantile Co.*,

262 F.2d 39, 41 [10th Cir.]), and "the subject matter of the suit is such that the issues cannot be properly understood or determined without the aid of opinions of persons of special knowledge or experience" (*Gilbert* v. *Gulf Oil Corp.*, 175 F.2d 705, 709 [4th Cir.]).

The present case falls squarely within the doctrine of the foregoing cases. The jury here could hardly have been able to calculate the cost of carting away 188,000 cubic yards of dirt from the various job sites in question, without the aid of the testimony of an expert witness like O'Connell. In excluding such testimony, the trial court stated that it was objectionable on the ground that it called for "estimates" rather than "actualities" as to the "amount of trucking" (1574a-1575a). It is submitted, however, that where, as here, proof of "actualities" was not readily available, it was error for the court to refuse to receive competent expert opinion testimony even though the opinions expressed, though soundly based, might merely be "estimates."

CONCLUSION

The judgments of conviction of the defendants-appellants Michael Paterno and Paterno & Sons, Inc. should be reversed, and judgments of acquittal should be directed in their favor, or, in the alternative, said defendants-appellants should be granted a new trial.

Respectfully submitted,

ARTHUR KARGER,
Attorney for
Defendants-Appellants
Michael Paterno and
Paterno & Sons, Inc.

ARTHUR KARGER,
JAMES O. DRUKER,
Of Counsel.

ADDENDUM

Statutes Involved

18 U.S.C. § 371; 26 U.S.C. §§ 2701, 2706(1)

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

26 U.S. C. § 7201. Attempt to evade or defeat tax

Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7206. Fraud and false statements

Any person who—

> (1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.